Supreme Court, U.S
FILED

06-898 DEC 26 2006

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No._____

IN THE

Supreme Court of the United States

HECTOR L. HUERTAS,

Petitioner,

v.

CITY OF PHILADELPHIA, ET AL,

Respondents.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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December, 2006

QUESTIONS PRESENTED

Inconsistently with 28 U.S.C. § 1651, the District Court sua sponte held that the Petitioner lacked due diligence under discovery rule in prior false arrest lawsuit in discovering facts concerning the concealed racial conspiracy at bar. The Appellate Court sua sponte held that Petitioner lacked due diligence under equitable tolling in the prior lawsuit because of difficulties in attending depositions even though Petitioner proffered facts that disabilities hindered his attendance. The questions presented in this private conspiracy case are:

1. Whether an appellate court's sua sponte conclusion that difficulties in attending depositions even if due to disabilities constitutes failure, which failure shows lack of due diligence and timely bars subsequent independent claims.

2. When do claims concerning a conspiracy accrue when a pro se claimant litigating police-brutality injuries arising out of a false arrest discovers fraudulently concealed facts that establish such conspiracy that predated and caused the false arrest injuries?

LIST OF PARTIES BEFORE THE COURT AND TO THE PROCEEDING BELOW

Hector L. Huertas,
Petitioner,

City Of Philadelphia;
Mayor John Street;
City Of Philadelphia Police Department;
John Timoney, Former Police Commissioner;
Police Commissioner;
Charles Myers, Philadelphia Police Officer;
Irvin Riley, Philadelphia Police Officer;
James Quick, Philadelphia Police Officer;
Kenneth Vassallo, Philadelphia Police Officer;
Andrew J. Adams, Detective;
Richard Ross, Captain (Abandoned. Petitioner is in the belief that such party no longer has an interest in the outcome of petition for certiorari);
Sun Bancorp Inc;
Susan Dugan, Sun National Branch Employee;
John Tordini, Sun National Branch Employee;
Respondents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 10) [1] is unreported. The opinion of the district court (Pet. App., *infra*, 16), is unreported.

JURISDICTION

The final judgment of the Third Circuit Court of Appeals was entered on July 27, 2006. On October 17, 2006, Justice Souter signed an order extending the time for filing this petition for certiorari to and including December 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and also 28 U.S.C. § 1651 pursuant to Supreme Court Rule 14.1(g)(i)-(ii).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves 42 U.S.C. §1983:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

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[1] The designation "Pet. App.,*infra*, xx" refers to pages in the attached Appendix.

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This case also involves 42 U.S.C. §1985(2):
. . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

This case also involves 42 U.S.C. §1985(3):
. . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1343 (a)(1)-(4) because the civil action arose pursuant to 42 U.S.C. §§ 1983, 1985(2) and (3), and under 28 U.S.C. § 1331.

On October 17th, 2000, a Philadelphia branch of Sun Bancorp, respondent in this Court, was robbed and the bank teller, whom quit her job the next day, wrongfully concluded that the bank robber had a Hispanic accent. . [*See* 3rd Cir. Record No. 05-3807 Petitioner's Appendix("RApp") at p.48, 87-88]. The petitioner entered that branch the next day to

inquire about a business checking account. The branch manager notified police officers of the Philadelphia police department, respondents in this Court, and at that time they concluded the petitioner was the bank robber based on his ethnicity of Hispanic and because he was from Camden, New Jersey. This conclusion was based without any other evidence to corroborate the petitioner's involvement with the bank robbery of 0ctober 17th, 2000 or any other crime. Then, on October 26th, 2000 the petitioner, for the second time in a week, entered the Philadelphia branch of Sunbacorp to inquire about a business checking account at which time he was wrongfully arrested, suffered a police-brutality injury to his spinal cord, and was wrongfully accused of bank robbery without probable cause.

The petitioner hired Thomas Masciocchi of the law firm of Masciochi & Appel of Glendora, NJ, whom held the case until about May of 2002. The plaintiff then hired attorney Allan Denenberg and he held on to the file until September of 2002 at which time he returned the file to petitioner. [Rapp 56-86, Reply Brief 7-8]. The petitioner could not find another attorney thus he filed suit pro se on October 18th, 2002. On June 12th, 2003 during discovery phase, Sun Bancorp's first attorney, Robert Cerino, supplied petitioner Hector L Huertas with Initial Disclosures that included a memos from Susan Dugan, the Sun Bancorp branch manager and respondent in this Court, and other Sunbancorp employees which described how Philadelphia police officers, Susan Dugan and other employees established the petitioner as the bank robber. [Rapp 30-55]. The memos also described how Susan Dugan, on October 26th, 2000, ordered John Tordini, a Sunbancorp teller and respondent in this Court, to follow petitioner down Market Street on October 26th, 2000. John Tordini, by way of his cell phone, communicated to the Philadelphia police officers everything he saw the petitioner doing until the police officers approached the petitioner

Hector L Huertas, beat him to the ground thus herniating a disk in his spinal column, searched, seized, and incarcerated petitioner Hector L Huertas all without probable cause. That first lawsuit was dismissed by the District Court for the Eastern District of Pennsylvania. The petitioner appealed and the Third Circuit affirmed the District Court. (Pet. App., *infra*, 19). This Court denied certiorari at 05-462.

The petitioner then filed the instant lawsuit on May 2nd, 2005 concerning only the 42 U.S.C. § 1985(2) and (3) racial conspiracy claim, that he discovered on June 12th, 2003, in the District Court for the District of New Jersey because the Eastern District of Pennsylvania had previously denied petitioner's attempt to litigate that conspiracy claim that was concocted on October 18th, 2000, the first time petitioner had entered the Sunbancorp branch. The District Court for the District of New Jersey sua sponte dismissed the instant second lawsuit and the petitioner appealed. (Pet. App., *infra*, 10, 16). The Third Circuit agreed with pro se Petitioner Hector L Huertas in that the facts that constitute the unrelated private conspiracy were concealed from him until June 12th, 2003. However, because petitioner was not provide ample opportunity to attend the depositions in that prior lawsuit that litigated only the false arrest injuries, the Third Circuit thus held here that he could not benefit from equitable tolling of the § 1985(2) and (3) claims. This was even though such conspiracy was launched prior to the false arrest injuries of October 26th, 2000 and even though Petitioner did not discover such conspiracy until June 12th, 2003. This was also despite the fact that during that prior lawsuit, the Petitioner Hector L Huertas proffered a Department of Veterans' Affairs Medical report and an expert doctor report. The reports showed his military service connected disabilities of fear of heights, or claustrophobia, and the extent of his police-brutality injuries to his spinal

cord that hindered his ability to attend the depositions, most notably the depositions improperly scheduled on the 17th floor of a City of Philadelphia skyscraper after Petitioner informed Assistant City Solicitor Michele Dean of his claustrophobia. (Pet. App., *infra*, 22).

REASONS FOR GRANTING WRIT OF CERTIORARI

This case presents the court with an opportunity to resolve an extenuating intercircuit conflict on recurrent issues, that is, issues concerning the statute of limitations with regards to claims against police officers. See Wallace v. City of Chicago, et al, cert. granted at 05-1240. As in Wallace, the Third Circuit has adopted rules that makes it impossible to file suit against police officers concerning undiscovered claims, unless one files such claims during the 2-year limitations period of the initial false arrest, regardless of any fraudulent concealment of facts by the police officers and co-conspirators.

In Wilson v. Garcia, 471 U.S. 261, Justice O'Connor, dissenting, emphasized that:

> As well as co-opting federal legislation, the Court's decision effectively forecloses legislative creativity on the part of the States. Were a State now to formulate a detailed statutory scheme setting individualized limitations periods for various 1983 claims, drawing upon policies regarding the timeliness of suits for assault, libel, written contract, employment disputes, [471 U.S. 261, 285] and so on, the Supremacy Clause would dictate that the blunt instrument announced today must supersede such legislative fine-tuning. Presumably, today's decision would pre-empt such legislation even if the State's limitations period in a given case were more generous than the tort rule that

> the Court today mandates invariably shall apply. In the case of Blake v. Katter, 693 F.2d 677 (CA7 1982), for example, a plaintiff who claimed deprivation of liberty through false arrest enjoyed the benefit of Indiana's generous 5-year statute for claims against public officials. The same plaintiff would now find his 1983 cause of action foreclosed by the comparatively meager 2-year statute governing injuries to the person. Id., at 679-680.

Petitioner has at all times represented himself Pro Se in the courts below since about one week before the expiration of the statute of limitations in that prior lawsuit. The original attorney in that prior lawsuit, Thomas Masciocchi of Glendora New Jersey, held on to that lawsuit for about 18 months. Then the plaintiff took the file therewith to attorney Alan Denenberg of Philadelphia, Pennsylvania, whom returned the file to the petitioner about one month prior to the expiration of the 2-year statute of limitations in that prior lawsuit. [RApp. 56-86]. The petitioner was then unsuccessful in acquiring counsel and thus filed that prior lawsuit Pro Se about one week prior to the expiration of the 2-year statute of limitations.

In addition, in Colonial Penn Insurance, v. Market Planners Insurance Agency Inc., Et Al, 157 F.3d 1032 (5th Cir. 1998), the Fifth Circuit held that :

> The discovery rule provides a very limited exception to statutes of limitations. The rule postpones the running of the statutory limitation period until such time as the claimant discovers, or in exercising reasonable diligence should have discovered, facts that indicate he has been injured. The discovery rule applies only in cases where the claimant's injury was inherently undiscoverable, that is, where the plaintiff

> did not and could not know of the injury. The rule delays the statute of limitations only until the claimant knows or should know the facts that could support a cause of action, not until she realizes that the facts do support a cause of action.

This argument is also consistent with the Tenth Circuit's holding in Jana Locke v. Allstate Insurance Company, 1998 U.S. App. LEXIS 7816 HN6, to wit, "In addition, Oklahoma law defines actual fraud to include 'the suppression of that which is true, by one having knowledge or belief of the fact.' Okla. Stat. tit. 15, § 58.3 (1991)."

In the instant case, respondents had a fiduciary duty of notifying the petitioner that a Sun Bancorp manager ordered a bank teller to follow petitioner down the street informing a police officer with his cell phone everything the petitioner was doing. Such facts also revealed that Sun Bancorp employees, and the police officers, considered the petitioner their bank robber solely because they purportedly believed the actual bank robber had a Hispanic accent and because the petitioner entered that same bank branch the day after the robbery. This conspiracy to arrest the plaintiff was concocted long before the racially motivated police-brutality and false arrest of the petitioner that occurred when he entered the same bank branch about two weeks later. Such facts established a racially motivated civil conspiracy between the bank employees and the police officers involved in the racial profiling of the petitioner. The petitioner only discovered such facts during the discovery phase of the original lawsuit in which only his police-brutality and false arrest injuries were litigated. The attorney whom revealed such facts to the petitioner was subsequently replaced with another more hostile attorney.

This Third Circuit improperly argues that treating the petitioner's purported lack of diligence in the prior lawsuit as a prerequisite for the instant § 1985(2) and (3) racial conspiracy claims is proper and that it should render a nullity of the newly discovered facts that were fraudulently concealed by respondents that establish new independent conspiracy claims against respondents .

First of all, the petitioner did not fail to attend the scheduled depositions in that prior lawsuit, thus, there was no lack of due diligence on his part. The petitioner does not agree with the Third Circuit's interpretation of the word "failed." In Williams *v.* Taylor, 529 U.S. 420, this court held that:

> The word "fail" connotes some omission, fault, or negligence on the part of the person who has failed to do something. See, *e.g.*, Webster's New International Dictionary 910 (2d ed. 1939) (defining "fail" as "to be wanting; to fall short; to be or become deficient in any measure or degree," and "failure" as "a falling short," "a deficiency or lack," and an "[o]mission to perform"); Webster's New International Dictionary 814 (3d ed. 1993) ("to leave some possible or expected action unperformed or some condition unachieved"). See also Black's Law Dictionary 594 (6th ed. 1990) (defining "fail" as "[f]ault, negligence, or refusal"). To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. He is, as a consequence, at fault and bears responsibility for the failure. In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. Fault lies, in those circumstances,

either with the person who interfered with the accomplishment of the act or with no one at all.

In the instant case, petitioner argues that he proffered a Department of Veterans Affairs Report, in that prior lawsuit, that showed he was thwarted from attending the depositions due to his military service-connected disability of fear of heights, or claustrophobia. He also proffered in that prior lawsuit a doctor's expert report that showed he was further thwarted by his police-brutality injury to his spinal cord. The Third Circuit chose to disregard this evidence without any explanation for such oversight. (Pet. App., *infra*, 22-23). Finally, the Third Circuit has held here that that prior lawsuit was properly dismissed pursuant to Fed.R.Civ.P. 37 and that such dismissal of that prior lawsuit with prejudice constitutes lack of due diligence which timely bars the instant independent conspiracy claims.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

December, 2006

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APPENDICES

A. Opinion Of U.S. Court of Appeals for the Third Circuit No. 05-3807 . . . . . Pet.App. 10
B. Opinion of U.S. District Court for the District of New Jersey (June 3rd, 2005). . . . . Pet.App. 16
C. Opinion Of U.S. Court of Appeals for the Third Circuit NO. 05-1642. . . . . .Pet.App. 19

Hector L. **Huertas,** Appellant v. CITY OF PHILADELPHIA; MAYOR JOHN STREET; CITY OF PHILADELPHIA POLICE DEPARTMENT; JOHN TIMONEY, FORMER POLICE COMMISSIONER; SYLVESTER JOHNSON, POLICE COMMISSIONER; CHARLES MYERS, PHILADELPHIA POLICE OFFICER; IRVIN RILEY, PHILADELPHIA POLICE OFFICER; JAMES QUICK, PHILADELPHIA POLICE OFFICER; KENNETH VASSALLO, PHILADELPHIA POLICE OFFICER; ANDREW J. ADAMS, DETECTIVE; RICHARD ROSS, CAPTAIN; JOHN DOE 1-3; SUN BANCORP INC; SUSAN DUGAN, SUN NATIONAL BRANCH EMPLOYEE; JOHN TORDINI, SUN NATIONAL BRANCH EMPLOYEE

No. 05-3807

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2006 U.S. App. LEXIS 19027

May 12, 2006, Submitted Under Third Circuit LAR 34.1(a)
July 27, 2006, Filed

PRIOR HISTORY: On Appeal From the United States District Court For the District of New Jersey. (D.C. Civil No. 05-cv-02322). District Judge: Honorable Freda L. Wolfson.

JUDGES: Before: RENDELL, AMBRO and ROTH * , Circuit Judges.

* Judge Roth assumed senior status on May 31, 2006.

OPINION: OPINION OF THE COURT

PER CURIAM

In 2005 Hector L. **Huertas** filed a pro se civil rights action against the City of Philade[illegible]phia, Sun Bancorp, Inc., and various of their employees. He alleges that they conspired to deprive him of his civil rights in connection with his wrongful arrest for bank robbery on October 26, 2000. After the court sua sponte dismissed his complaint, **Huertas** filed a Rule 60(b) motion, which was denied; this appeal followed. For the reasons below we will affirm. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review of an order dismissing a complaint under 28 U.S.C. § 1915 is plenary. Tourscher v. McCullough, 184 F.3d 236 (3d Cir. 1999).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

I

The District Court dismissed the complaint on two grounds. First, the Court found that it was virtually identical to a previous complaint **Huertas** had filed against the same defendants. n2 However, in the first complaint the named defendants were the City of Philadelphia and Sun Bancorp, Inc. In the instant complaint **Huertas** retained those defendants but also added several of their officers and other employees. As we have explained, "res judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between

successive defendants." Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 966 (3d Cir. 1991). The District Court did not address whether such a relationship is present here, perhaps because it does not appear to have noticed that **Huertas** added defendants in his second action. Moreover, we have not had occasion to apply the general principle stated in Lubrizol to a case such as **Huertas'** where the defendants in the initial action included a municipality and the second added certain of its officers and other employees. Other courts have declined to assume that privity exists between a municipality and its officers or other employees, Headley v. Bacon, 828 F.2d 1272, 1276-1280 (8th Cir. 1987), especially where, as here, the added defendants are sued in both their personal and official capacities. See Conner v. Reinhard, 847 F.2d 384 (7th Cir. 1988).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Earlier this year we affirmed the dismissal, with prejudice, of that complaint for discovery abuse. See **Huertas** v. City of Philadelphia, 139 Fed. Appx. 444 (3rd Cir. 2005).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*4]

II

We need not resolve that question here, however, because we agree with the District Court that **Huertas'** complaint is barred as untimely. n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 The statute of limitations is an affirmative defense and as such is not grounds for sua sponte dismissal under § 1915 unless the defense is obvious from the face of the complaint and no development of the factual record is required to determine whether dismissal is appropriate. Fogle v. Pierson, 435 F.3d 1252, 1258 (10th Cir. 2006); Pino v. Ryan, 49 F.3d 51 (2d Cir. 1995) (collecting cases). Those conditions are met here. Not only is the defense obvious from the allegations in the complaint, but **Huertas** himself expressly raised the issue, offering reasons in his complaint why the statute should be tolled.

---------- End Footnotes----------

The statute of limitations for **Huertas'** action is governed by the personal injury statute of limitations of Pennsylvania, the state in which the cause of action accrued. O'Connor v. City of Newark, 440 F.3d 125, 126 (3d Cir. 2006). That period is two years, subject to any state law tolling provisions which are not inconsistent with federal law. Lake v. Arnold, 232 F.3d 360, 368-369 (3d Cir. 2000). Such provisions include the "discovery rule," which tolls the statute of limitations where the plaintiff neither knew nor reasonably should have known of his injury and its cause at the time his right to institute suit arose. Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 140 n.30 (3d Cir. 2005); Pocono Intern. Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983). Because the various injuries **Huertas** alleges were incident to his arrest in October 2000, the instant complaint is barred unless equitable tolling applies.

Huertas states that he was hampered in the prosecution of his first action by the City's persistent refusal to provide him with the addresses of the individual defendants, that this

prevented him from including the individual defendants in his initial action, and that his initial action failed due to his lack of experience and preparation. He appears to offer these reasons not merely to justify filing the second action [*6] but also as grounds for equitable tolling of the statute of limitations. Complaint at PP 60-71. He also asserts the discovery rule, claiming that he was unaware until June 2003 of certain evidence allegedly demonstrating the existence of a conspiracy among the defendants and, thus, was unaware of his injury until then. Id. at PP 75-78.

As we have explained, "[e]quitable tolling is an extraordinary remedy which should be extended only sparingly." Hedges v. United States, 404 F.3d 744, 751 (3d Cir. 2005). Moreover, it is unavailable unless the plaintiff exercised due diligence in pursuing his claims. Id. **Huertas** has not made sufficient showing that equitable tolling is warranted in his case. His ignorance, inexperience and pro se status during the first action do not toll the statute of limitations. See, Hedges v. United States, 404 F.3d 744, 752-753 (3d Cir. 2005); Pocono Intern. Raceway, Inc., supra.

Nor is there any merit in **Huertas'** attempt to invoke the discovery rule. His argument turns on the contention that it was not until June 2003 that he received Sun Bancorp's Rule 26(a) disclosures in his previous action. According to **Huertas,** these disclosures indicate the existence of a conspiracy manifested by the manner in which a bank teller "coordinated the attack against the plaintiff by maneuvering and instructing the police toward the location of the plaintiff." Complaint at P 80. However, in June 2003 his first action was still pending and he received the materials in question in the course of those proceedings. Had **Huertas** exercised the diligence required for equitable tolling, that action would not have been dismissed - for repeated failure

to attend depositions - in the first place and he would not have needed to file another complaint. Because he did not exercise due diligence, he may not benefit from equitable tolling and the instant complaint remains time-barred.

Accordingly, we will affirm the order of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hector L. Huertas,	:	Civil Action No. 05-2322
Plaintiff,	:	
v.	:	
City Of Philadelphia, Et Al.,	:	**ORDER**
Defendants	:	

This matter having been opened to the Court on its own motion having received Plaintiff pro se Hector Huertas's ("Plaintiff" or "Mr. Huertas") Complaint and application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and the Court having undertaken a review of Plaintiff's Complaint; good cause having been shown; and it appearing that:

1. Plaintiff filed his Complaint against Defendants with this Court on May 2, 2005. His Complaint is virtually identical to a lawsuit which he filed in the Federal District Court for the Eastern District of Pennsylvania and which the Honorable Herbert J. Hutton, U.S.D.J. dismissed with prejudice on January 26, 2005. See Huertas v. City of Philadelphia, No. Civ. A. 02-7955, 2005 WL 226149 (Jan. 26, 2005). Plaintiff's filing of his Complaint with this Court is an attempt to take a proverbial "second bite at the apple," and cannot proceed in this Court on this basis. See Lui v. Commission, Adult Entertainment, De, 369 F.3d 319, 328 n.11 (3d Cir. 2004).

2. A second basis for finding that Plaintiff's Complaint cannot proceed is that Plaintiff's claims are time-

barred because federal courts apply state personal injury statutes of limitation to claims asserted pursuant to 42 U.S.C. §§ 1983 and 1985. Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (general personal injury statute of limitations governs § 1983 claims); Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); Pratt v. Thornburgh, 807 F.2d 355 (3d Cir.1986), cert. denied, 484 U.S. 839, 108 S.Ct. 125, 98 L.Ed.2d 83 (1987) (personal injury statute of limitations governs § 1985 claims).

3. Plaintiff's arrest by Philadelphia police officers on October 26, 2000 is the incident that forms the basis for his Complaint. All acts took place in Pennsylvania, and indeed, this action and the Defendants have no connection to New Jersey. Plaintiff is simply trying to avoid the fact that he may not proceed with his claims in Pennsylvania.

4. Pennsylvania has a two-year limitations period on personal injury actions, 42 Pa.C.S. § 5524, as does New Jersey, N.J.S.A. 2A:14-2. October 26, 2000 is clearly more than two years prior to the filing of Plaintiff's Complaint with this Court on May 2, 2005. Thus, if the statute of limitations on Plaintiff's claims began to run on October 26, 2000, when the plaintiff knew or had reason to know of the injury which is the basis of his claims, see Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991), the claims would obviously be time-barred.

5. Plaintiff argues in his Complaint that, pursuant to the discovery rule, his claims are not time-barred because the statute of limitations should be tolled until June 12, 2003. Compl. ¶ 78.

6. Generally, a party asserting a cause of action is under a duty to use all reasonable diligence to be informed of the facts and circumstances on which his claims would be based, and to institute suit within the prescribed statutory period. See Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (1983). "[L]ack of

knowledge, mistake or misunderstanding do not toll the running of the statute of limitations." Id. The discovery rule "arises from the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were actually ascertained within the period." Id. at 471-72.

7. Mr. Huertas, as the plaintiff seeking to benefit from the discovery rule, has the burden of establishing his inability to know of the injury despite the exercise of due diligence. See Toy v. Metropolitan Life Ins. Co., 863 A.2d 1, 7 (Pa. Super. 2004) (citing Dalrymple v. Brown, 549 Pa. 217, 701 A.2d 164, 167 (1997)). However, he offers only that the statute of limitations should be tolled because until June 12, 2003, he had "no idea" and "[no] knowledge whatsoever" of "the widespread, broad, all-embracing civil conspiracy" that was "perpetrated against him" Compl. ¶¶ 78-82. Because "lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations," see Pocono Int'l Raceway, Inc., 468 A.2d at 471, the discovery rule does not apply and Plaintiff's claims are time-barred. Therefore, based upon the reasons stated above, Plaintiff's case is dismissed. Accordingly,

IT IS on this 3rd day of June, 2005, hereby

ORDERED that Plaintiff's application to proceed in forma pauperis is **GRANTED**; and it is further,

ORDERED that Plaintiff's case is **DISMISSED**; and it is further,

ORDERED that the Clerk is directed to mark this case **CLOSED**.

/s/ Freda L. Wolfson

FREDA L. WOLFSON, U.S.D.J.

HECTOR L. **HUERTAS,** Appellant v. CITY OF PHILADELPHIA; SUN BANCORP, INC.

NO. 05-1642

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

139 Fed. Appx. 444; 2005 U.S. App. LEXIS 14602

July 14, 2005, Submitted Under Third Circuit L.A.R. 34.1(a)
July 19, 2005, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by **Huertas** v. Philadelphia, 2005 U.S. LEXIS 9266 (U.S., Dec. 12, 2005)

PRIOR HISTORY: On Appeal from the United States District Court For the Eastern District of Pennsylvania. (D.C. Civ. No. 02-cv-007955). District Judge: Honorable Herbert J. Hutton. **Huertas** v. City of Philadelphia, 2005 U.S. Dist. LEXIS 1282 (E.D. Pa., Jan. 26, 2005)

JUDGES: Before: SLOVITER, BARRY and FISHER, CIRCUIT JUDGES.

OPINION:

PER CURIAM

This appeal arises from the dismissal of Appellant Hector **Huertas'** complaint as a sanction for his continued failure to attend scheduled depositions. For the reasons that follow, we will affirm.

The parties are familiar with the facts, thus, we will only briefly summarize them here. On October 17, 2000, a robbery was reported at the Sun National Bank in Philadelphia. On October 26, 2000, **Huertas** walked into the bank. A bank employee, believing that **Huertas** fit the description of the robber, notified the [**2] Philadelphia Police. **Huertas** alleges that the police responded by violently arresting him, causing permanent injuries. On October 18, 2002, **Huertas** filed a complaint under 42 U.S.C. § 1983 alleging violations of his civil rights by the City of Philadelphia in conspiracy with Sun Bancorp.

Huertas immediately requested that the Defendants complete hundreds of interrogatories, and began filing numerous motions with the District Court. After a number of filings by all parties, the District Court entered a series of orders denying **Huertas'** motions to compel discovery and to amend his complaint, as well as several other motions seeking various other remedies. See D. Ct. Docket Nos. 40-50. During this period, the Defendants scheduled a deposition, which **Huertas** failed to attend. This process of notice and failure to attend recurred several times over the course of the next year. On November 8, 2004, while still in the discovery phase, the Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 37(b), (d). The District Court held that **Huertas'** failure to attend multiple depositions, once in defiance of a court order, was sufficient to warrant dismissal after conducting the six-factor inquiry announced in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984).

We have jurisdiction under 28 U.S.C. § 1291 and review the dismissal of a complaint under Rule 37 for abuse of discretion. Id. In determining whether the District Court

abused its discretion, "we will be guided by the manner in which the court balanced the Poulis factors and whether the record supports its finding." Ali v. Sims, 788 F.2d 954, 957 (3d Cir. 1986). The factors are:

(1) the extent of the party's personal responsibility; (2) the prejudice, to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis, 747 F.2d at 868.

First, the District Court concluded that [**4] **Huertas** was personally responsible. The record confirms that **Huertas,** who is proceeding pro se, failed to adhere to the local and federal rules of procedure, despite the District Court's attempts to provide guidance. See Order, Docket No. 49, n.1; Order, Docket No. 89 n.1; Order, Docket No. 104 n.2. **Huertas** argues that because he appeared for his fifth deposition on November 4, 2004, at 1:37 p.m., only four hours late, it was the Defendants' fault for not taking his deposition at that time. His argument is without force. He provides no reason as to why he did not arrive at 9:30 a.m. Further, that the Defendants used email to reject **Huertas'** request to reschedule the deposition does not transfer the fault to the Defendants. If anything, **Huertas'** failure to check his email, a means of communication he clearly intended to use, only damages his argument.

Next, we agree with the District Court that the Defendants suffered substantial prejudice in scheduling and holding five depositions, all of which **Huertas** failed to attend. See Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988) (finding the costs and time associated with scheduling unattended depositions was prejudicial). Also, **Huertas'** failure to appear for depositions after receiving adequate notice and his failure to pursue any protection from the District Court establishes a pattern of dilatory conduct. See Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund, 29 F.3d 863, 874-75 (3d Cir. 1994).

With respect to bad faith or willfulness, **Huertas** argues that his fear of heights and back injury prevented him from attending his depositions, and that his lack of attendance was not designed to prevent the defense from taking his deposition. It is not so clear that **Huertas'** conduct was willful as defined by this Court. Adams, 29 F.3d at 875 ("tardiness not excused for inability is not necessarily willful."). **Huertas'** disabilities did not, as far as we can discern, prevent him from timely filing for protective orders, nor does he explain how his disability prevented his 9:30 a.m. appearance at his fifth deposition. However, this does not show that **Huertas'** conduct was designed to be "strategic or self-serving," an inference usually required for a finding of willfulness. Id. With respect to the fifth factor, alternative sanctions would likely be ineffective, n1 or at least other available sanctions would amount to what in effect would be the dismissal of the complaint.

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n1 For example, even after **Huertas** was ordered to pay $ 200

for failure to comply with applicable rules of procedure, no significant change was seen in his conduct.

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Finally, we agree that **Huertas'** complaint asserts arguably meritorious claims. While we continue to adhere to the principle that "doubts should be resolved in favor of reaching a decision on the merits," see Scarborough v. Evans, 747 F. 2d 871, 878 (3d Cir. 1984), that **Huertas'** conduct was not necessarily willful does not make the District Court's balance unreasonable. See Ware v. Rodale Press, Inc. 322 F.3d 218, 221 (3d Cir. 2003) (stating "each factor need not be satisfied for the trial court to dismiss a claim"). The District Court did not abuse its discretion in dismissing the complaint. Accordingly, we will affirm. n2

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n2 **Huertas** also appeals from a number of other orders denying his various motions to amend his complaint, compel discovery, and for either dismissal or default judgment. Our affirmance of the District Court's dismissal is dispositive. Accordingly, we need not decide the propriety of these other orders.

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